(2)

Supreme Court, U.S.
FILED
MAY 6 - 2005
OFFICE OF THE CLERK

No. 04-1240

IN THE

Supreme Court of the United States

ROYAL CARIBBEAN CRUISES, LTD.,

Petitioner,

v.

LAWRENCE W. HALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF IN OPPOSITION

MICHAEL D. ERIKSEN
ROMANO, ERIKSEN & CRONIN
Post Office Box 21349
West Palm Beach, FL 33416-1349
(561) 533-6700

194037

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

REASON FOR DENYING THE PETITION 3

Florida's Third District Court of Appeal correctly evaluated Petitioner's responsibility, as a ship owner purveying alcohol to fare-paying passengers aboard a vessel in navigation on the high seas, by reference to existing uniform and sufficient rules of federal maritime common law, rather than by cherry-picking the nearest state's dram shop act, as urged by Petitioner. 3

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Cases *Page*

Bay Casino, LLC v. M/V Royal Empress, 199 F.R.D. 464 (E.D. N.Y. 1999) 13

Beckham v. Rick's Watercraft Rentals, 719 So.2d 1025 (Fla. 3rd DCA 1998) 6

Carey v. Bahamas Cruise Lines, 864 F.2d 201 (1st Cir. 1988) 12

Fenniger v. Harris Crab House, Inc., 2000 W.L. 289735 (4th Cir. 2000) 8

Flying Boat, Inc. v. Alberto, 723 So. 2d 866 (Fla. 4th DCA 1998) 13

Holmes v. Oregon & California Ry. Co., 5 F. 523 (D. Ore. 1881) 5, 11

Horak v. Argosy Gaming Co., 648 N.W. 2d 137 (Iowa 2002) 10

In re: Amtrak, "Sunset Limited," 121 F.3d 1421 (11th Cir. 1997) 8

In re: Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004) 6

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S. Ct. 406 (1959) 6, 7

Cited Authorities

Page

Kludt v. Majestic Star Casino, LLC, 200 F. Supp. 2d 973 (N. D. Ind. 2001) 3, 10, 13

Lottawanna, The, 88 U.S. 558 (1874) 4

Meyer v. Carnival Cruise Lines, Inc., 1994 W.L. 832006 (N. D. Cal. 1994) 9

Northern Commercial Co. v. Nestor, 138 F. 383 (9th Cir. 1905) 11

Olsen v. New York Central Railroad, 341 F.2d 233 (2nd Cir. 1965) 7, 8

Reyes v. Vantage Steamship Co., Inc., 558 F.2d 238 (5th Cir. 1977) 6, 8

Reyes v. Vantage Steamship Co., 672 F.2d 556 (5th Cir. 1982) 12

Robinson v. Pioche, 5 Cal. 460 (1855) 11

Thier v. Lykes Bros., Inc., 900 F. Supp. 864 (S. D. Tex. 1995) 9

Voillet v. Red and White Fleet, 2004 W.L. 547146 (N.D. Cal. 2004) 9

Young v. Players Lake Charles, LLC, 47 F. Supp. 2d 832 (S.D. Tex. 1999) 10, 13

Cited Authorities

Page

Statutes

§ 768.125, F.S. (2000) 3

46 U.S.C.A. § 183c 5

46 U.S.C.A. § 740 11

Indiana Code § 7.2-5-10-15.5 3

Other Authorities

Robert D. Peltz, *"The Myth of Uniformity in Maritime Law,"* 21 Tul. Mar. L. J. 103 (Winter, 1996) 4

I SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-1, 4-3, 5-1, 5-2 (4th Ed. 2004) 4

INTRODUCTION

This case involves a maritime injury claim by a Tennessee passenger against a Liberian cruise ship owner which arose entirely on the international high seas, aboard a vessel navigating between the Bahamas and Florida, wholly outside the territorial limits of Florida. Respondent alleged that he fell and sustained severe brain damage because Petitioner was negligent in the way it purveyed alcohol to passengers aboard its vessel and in the way it handled obviously inebriated passengers such as Respondent who posed a danger to themselves and others aboard Petitioner's vessel. The Florida Third District Court of Appeal, applying federal maritime common law, determined that Respondent's second amended complaint stated a cause of action.

Petitioner's preamble implies that the state intermediate appellate court went off on a lark, creating novel duties imposing new liability on ship owners who purvey alcohol to passengers and crew aboard vessels navigating on the international high seas.

All the Florida Third District Court of Appeal really did was adopt a majority view among federal maritime courts, that the standard of care applicable to ship owners who purvey alcohol, and passengers who consume it, aboard vessels on the international high seas, can be ascertained by applying existing principles of federal maritime common law. The state intermediate appellate court saw this approach as necessary to promote the principle of uniformity in maritime law. Consequently, the state appeals court rejected Petitioner's own suggested approach, which was to cherry-pick and apply the nearest state's dram shop statute, even if it directly

conflicts with otherwise applicable, existing rules of federal maritime common law.[1]

SUMMARY OF ARGUMENT

Providing alcohol to passengers or crew aboard a vessel in navigable waters has been judicially determined to be potentially dangerous and to have the capability to disrupt maritime commerce. Vessel owners engaging in such activities have therefore traditionally been required to exercise "reasonable care under the circumstances" pursuant to federal maritime common law. To our knowledge, no appellate court has ever displaced federal maritime common law with a local state's dram shop act to *immunize* a vessel owner who is negligent in the way it provides alcohol to passengers or crew aboard a vessel in navigation. That, however, is precisely what the state trial court did in the present case; and it was correctly reversed by the Florida Third District Court of Appeal for doing so.

The state appeals court correctly found that Count I of Respondent's second amended complaint sufficiently states a cause of action for negligence against Petitioner under principles of traditional maritime common law long applicable to vessel owners who are negligent in the providing of alcohol to passengers or crew aboard vessels in navigation. Under that same maritime common law, voluntary intoxication by a plaintiff only mitigates damages, and is not the complete defense the state trial court apparently believed it to be.

---

1. Since the state appeals court found existing federal maritime common law to be sufficient, there was no need to perform a *Wilburn* analysis, as urged by the Petitioner.

REASON FOR DENYING THE PETITION

Florida's Third District Court of Appeal correctly evaluated Petitioner's responsibility, as a ship owner purveying alcohol to fare-paying passengers aboard a vessel in navigation on the high seas, by reference to existing uniform and sufficient rules of federal maritime common law, rather than by cherry-picking the nearest state's dram shop act, as urged by Petitioner.

According to Petitioner, in the absence of a specific federal maritime dram shop *statute*, a trial court is free to disregard traditional federal maritime common law rules governing the responsibilities of ship owners who purvey alcohol to passengers and/or crew, and instead cherry-pick and apply a dram shop statute of one state (Florida), which just happens to immunize sellers and providers of alcohol to adults in virtually all circumstances.[2]

Petitioner's suggested approach is supreme irony, given the words of Petitioner's trial counsel, written elsewhere, that:

> The preemption test under the admiralty clause should start with the proposition that there is a

2. § 768.125, F.S. (2000) is entitled "Liability for Injury or Damage Resulting from Intoxication." Under its provisions, only a seller or server who *knows* an adult customer is an alcoholic ("habitually addicted") can be liable. It is, for all practical purposes, an immunity statute for those sellers who are not either psychic or the customer's close family member or friend "in the know" about the customer's diagnosis of alcoholism. *Compare, e.g.*, Indiana Code § 7.2-5-10-15.5 (making sellers liable merely for serving alcohol to "visibly intoxicated" persons), cited in *Kludt v. Majestic Star Casino, LLC*, 200 F. Supp 973, 980 (N.D. Ind. 2001).

> presumption in favor of preemption as to all matters falling within admiralty jurisdiction. *Another disturbing trend that has been gaining momentum over the years has been to limit the application of preemption in maritime matters to acts of Congress, ignoring the extensive body of maritime common law. This trend not only ignores the constitutional underpinnings of the uniformity rule, but also is based upon a faulty constitutional analysis* . . . (our emphasis)
>
> In the early cases, the United States Supreme Court expressed no doubt that the constitution intended maritime common law to play an integral, if not central, part in the uniform system of admiralty law which the framers envisioned.

Robert D. Peltz, *"The Myth of Uniformity in Maritime Law,"* 21 Tul. Mar. L. J. 103, 130 (Winter, 1996), *citing The Lottawanna*, 88 U.S. 558, 574 (1874) ("It certainly could not have been intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated . . . uniformity . . ."); *see also, generally*, I SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-1, 4-3, 5-1, 5-2 (4th Ed. 2004) (the "general maritime law" is federal judge-made common law) (treatise available on Westlaw).

Petitioner's brief, on page 15, asserts, in bold, **"There is no general maritime rule which imposes liability for furnishing alcoholic beverages** . . ." To be more precise, it should read, "There is no traditional federal maritime common law rule creating immunity for purveyors of alcohol for consumption aboard vessels in navigation on the high seas."

Federal maritime common law has *always* required ship owners, no matter where they are, to exercise reasonable care for passengers where alcohol aboard vessels is concerned. *See, e.g., Holmes v. Oregon & California Ry. Co.*, 5 F. 523, 537 (D. Ore. 1881) ("defendant received [passenger] on its boat without objection and if he was palpably drunk was bound to take care of him"); *and cases cited at p.10, infra.* As a consequence, there has never been a need for Congress *per se* to enact a dram shop statute (which typically create *exceptions* to common law immunities, if any).

One statute that Congress did enact is 46 U.S.C.A. § 183c, which states:

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port, to assert in any rule, regulation, contract, or agreement, any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability . . .
>
> All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C.A. § 183c includes no alcohol-related exceptions to the stated strong federal maritime public policy favoring full shipowner liability to passengers for its negligence, if any. Petitioner thus seeks, in the present case, a result which Petitioner itself could not legally impose by contract with a passenger, namely, to immunize Petitioner for its negligence, if any, in

providing alcohol to passengers for consumption aboard its vessels on the high seas, or in negligently failing to assist obviously inebriated fare-paying passengers who may pose a danger to themselves or others.

Maritime common law on this issue is driven by the need to minimize alcohol-related incidents on the high seas, which can disrupt international maritime commerce.[3] *See*, *e.g.*, *In re: Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) (drunken captain grounded tanker, spilling oil); *also cf. Beckham v. Rick's Watercraft Rentals*, 719 So.2d 1025 (Fla. 3rd DCA 1998) (discussing disruptive effect of maritime injuries on commerce). States which are primarily interested in limiting the liability of local purveyors of alcohol have few, if any, such concerns. Petitioner does not explain how removing the consequences of carelessness will encourage ship owners to be careful how they facilitate, if not encourage, the consumption of alcohol by passengers or crew aboard their vessels on the high seas.

The applicable federal maritime common law rule was restated (again) by this court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959) as follows:

> The district court was in error in ruling that the governing law in this case was that of the state of

3. *Reyes v. Vantage Steamship Co., Inc.*, 558 F. 2d 238 (5th Cir. 1977) provides a good example of how negligence in the way alcohol is provided to persons aboard a ship in navigation can actually disrupt maritime commerce. The ship had to stop to attempt to rescue a drunken crew member who fell overboard and drowned. By contrast, alcohol-related mishaps ashore typically do not disrupt international commerce. There may be a call for an ambulance, or for the police; but there is no need to stop ships in the middle of the ocean, to call other vessels to assist in rescues, or to turn ships around for purposes of delivering injured persons to the nearest port for medical treatment.

> New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law [citations omitted] . . .
>
> If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties . . .
>
> *It is a settled principle of maritime law that a ship owner owes the duty of exercising reasonable care toward those lawfully aboard the vessel who are not members of the crew* . . . (our emphasis)
>
> In instructing the jury that contributory negligence on Kermarec's part would operate as a complete bar to recovery, the district court was clearly in error. The jury should have been told instead that Kermarec's contributory negligence was to be considered only in mitigation of damages.

79 S. Ct. at 408-09. In *Kermarec*, this court did not, as urged here by Petitioner, limit a ship owner's "duty of exercising reasonable care" only to sober people aboard the vessel. *See Olsen v. New York Central Railroad*, 341 F. 2d 233, 234 (2d Cir. 1965) (under *Kermarec*, ship owner had "reasonable care" responsibility to protect intoxicated visitor).

Petitioner suggests that there is conflict among federal circuits concerning the applicable maritime common law rule, and, if so, state law may be applied.[4] *Brief of Petitioner* at 13, 18-19; however, concerning the present issues, there is no conflict at all. This court has spoken, in *Kermarec*, *supra*. A ship owner has a general responsibility to exercise reasonable care in all of its activities and undertakings, and there is no exception where alcohol is involved; and where such a "substantive maritime principle [is] placed at risk by the potential application of state law, *there is no leeway for variation or supplementation by state law.*" *In re: Amtrak, "Sunset Limited,"* 121 F.3d 1421, 1426 (11th Cir. 1997) (emphasis added).

Petitioner points out that we cited below to *Reyes v. Vantage Steamship Co., Inc.*, 558 F. 2d 238 (5th Cir. 1977), which Petitioner tries to distinguish as an unseaworthiness case, not applicable to passengers. *Brief of Petitioner*, at 12 n.8. Petitioner's argument, however, overlooks that *Reyes* was also a negligence case. 558 F.2d at 238. As to the ship owner's *negligence*, the court stated:

> Since Reyes drank too much in the confined areas of a ship whose master (and owner) had supplied the intoxicants to the likely detriment of the

4. To create a "conflict among circuits" on this issue, Petitioner relies upon *Fenniger v. Harris Crab House, Inc.*, 2000 W.L. 289735 (4th Cir. 2000), an unpublished case. *See Brief of Petitioner* at pp. 12-13, 19. *Fenniger*, however, was a shoreside premises liability case, decided under the law of Maryland, where the plaintiffs were patrons of defendant's inn, located on a dock. The plaintiffs were not passengers and the defendant was not a maritime common carrier. *Compare Olsen v. New York Central Railroad*, 341 F.2d 233, 234 (2d Cir. 1965) (ship owner owed maritime duty of reasonable care to protect intoxicated visitor).

> seaman and the whole crew without any supervisory control of its use, *the vessel must bear at least part of the fault* . . .
>
> The practice of selling alcohol in such great quantities to the crew should not have been overlooked, or impliedly neglected by the district court in its findings. Surely had this man not been drunk he would never have gone swimming in the ocean initially. It is the opinion of this court that the practice revealed by this record of operating a floating dram shop makes a ship unseaworthy, *and if not that, at least clearly negligent.* (emphasis added)

558 F. 2d at 244; *See also, e.g., Thier v. Lykes Bros., Inc.*, 900 F. Supp. 864, 878-79 (S. D. Tex. 1995) (seaman status of plaintiff irrelevant to ship-owner liability under federal maritime common law for negligence in "failing to monitor alcohol consumption aboard, fostering a party atmosphere, etc.")

Petitioner relies heavily on two unreported decisions from federal District Judge Patel of the Northern District of California forming the "minority view" explicitly rejected by Florida's Third District Court of Appeal. *See Meyer v. Carnival Cruise Lines, Inc.*, 1994 W.L. 832006 (N.D. Cal. 1994) (Patel, J.) and *Voillet v. Red and White Fleet*, 2004 W.L. 547146 (N.D. Cal. 2004) (Patel, J.). In the first case (*Meyer*), Judge Patel noted that, "Meyer does not dispute that no federal maritime dram shop rule exists." With all due respect to Mr. Meyer, he *should* have disputed that point (as we have done in this case) because there most certainly *is* an applicable and completely sufficient federal maritime common law rule ("reasonable care under the circumstances").

District Judge Patel's leap to the nearest state's dram shop rule was, with respect, simply wrong; and it only serves to disrupt, rather than to promote, uniformity in such cases. Judge Patel's analysis in *Meyer*, rejected by Florida's Third District Court of Appeal, has not been adopted by any other maritime court, state or federal. *See*, *e.g.*, *Young v. Players Lake Charles, LLC*, 47 F. Supp. 2d 832 (S.D. Tex. 1999) (*Meyer* not persuasive); *Kludt v. Majestic Star Casino, LLC*, 200 F. Supp. 2d 973, 978 (N.D. Ind. 2001) (same). Using Judge Patel's reasoning, a court in a maritime case could just as easily cherry-pick the dram shop statute of, say, Iowa, which imposes upon alcohol-purveying defendants a *higher* standard than "reasonable care under the circumstances." *See Horak v. Argosy Gaming Co.*, 648 N. W. 2d 137, 146 (Iowa 2002) (Iowa dram shop statute more favorable to plaintiffs than federal maritime common law).

Petitioner, far from seeking uniformity, actually advocated below that purveyors of alcohol aboard vessels should have *five different* standards of care: one for seamen who drink and get injured; another for passengers who drink and get injured; another for third parties who may be injured off the ship as a consequence of alcohol sales aboard the ship; another for riverboats, and yet another for vessels on the high seas. Under Petitioner's analysis, maritime commerce would presumably be less disrupted by a ship owner's negligence if a drunk who fell overboard was a passenger instead of a seaman as in *Reyes*, *supra.*

Florida's Dram Shop Act, unlike Petitioner, makes no distinction among seamen, passengers, or third parties injured elsewhere. Florida's Dram Shop Act would immunize ship owners as to all; and if any court lets that genie out of the bottle (no pun intended), the very next case we shall see will

involve a ship owner asserting a local dram shop act like Florida's as a complete defense to a seaman's claim, or to a claim by a motorist injured off a ship as a consequence of alcohol sales aboard a ship (which would otherwise be governed by maritime law pursuant to the Admiralty Extension Act, 46 U.S.C.A. § 740).

Petitioner implies that, in the eyes of maritime law, fare-paying passengers of maritime common carriers are second-class citizens, deserving of a lower level of ship-owner responsibility and care than seamen. *Brief of Petitioner* at 12 n.8. Nothing, however, could be further from the truth. *Northern Commercial Co. v. Nestor*, 138 F. 383 (9th Cir. 1905) ("a passenger . . . is entitled to no less care from the ship than a seaman").

Over 120 years ago, in *Holmes v. Oregon & California Ry. Co.*, 5 F. 523, 537 (D. Ore. 1881), where the decedent was an intoxicated ferry passenger who fell over the side, the court said:

> *The defendant was a common carrier of passengers* for hire, and for their protection was subject to a very strick (sic) responsibility. *Therefore, it was bound to provide for the safety of the deceased,* while upon its boat and getting on shore, "so far as was practical by the exercise of human care and foresight . . ." [citation omitted] . . . *The defendant received him on its boat without objection, and if he was palpably drunk it was bound to take care of him accordingly.* (our emphasis)

5 F. at 538-39; *citing Robinson v. Pioche*, 5 Cal. 460 (1855) (Hydenfelt, J.) ("A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.")

Concerning its fare-paying passengers, Petitioner essentially asked the Florida Third District Court of Appeal to downgrade its responsibilities as a maritime common carrier to the liability, if any, of a shoreside establishment like a 7-11 or a corner bar. Such shoreside establishments, however, do not enter into contracts of carriage for hire, with the extensive extra legal responsibilities associated with them.

Petitioner's entire presentation implicitly deems passengers like Respondent as miscreants who simply deserve to be injured. If that is true, a jury can "spank" such passengers with the paddle of comparative negligence. *See, e.g., Reyes v. Vantage Steamship Co.*, 672 F. 2d 556, 557 (5th Cir. 1982) (ship owner 15% at fault and seaman 85% at fault where unchecked alcohol sales contributed to a seaman's death). However, judicially eliminating Respondent's entire cause of action, as desired by Petitioner, would directly and impermissibly conflict with traditional federal maritime common law of negligence, as follows:

> One of the essential and longstanding features of substantive admiralty law is that contributory negligence can be considered only in mitigation of damages . . . *contrary rules under which contributory negligence wholly bars an injured person from recovery are "completely incompatible" with modern admiralty practice.* [citation omitted] . . . This case involves a maritime tort; the court should have applied the maritime rule under which the plaintiff's comparative negligence only mitigates her damages. (our emphasis)

Carey v. Bahamas Cruise Lines, 864 F. 2d 201, 207 (1st Cir. 1988) (rejecting application of Massachusetts contributory negligence rule to cruise ship injury).

Since there are applicable and sufficient federal maritime common law rules ("reasonable care under the circumstances" for ship owners, and comparative negligence in mitigation of damages for plaintiffs) there was no need for Florida's Third District Court of Appeal to carry out a *Wilburn* analysis[5] in this case, unless Florida's Dram Shop Act provided a more favorable remedy to the plaintiff than maritime law, which it does not. *Kludt v. Majestic Star Casino, LLC*, 200 F. Supp. 2d 973, 978 (N. D. Ind. 2001) (no need to fashion federal maritime dram ship rule, federal maritime common law suffices); *Bay Casino, LLC v. M/V Royal Empress*, 199 F.R.D. 464, 466 (E. D. N.Y. 1999) (same); *Young v. Players Lake Charles, LLC*, 47 F. Supp. 2d 832, 834-36 (S. D. Tex. 1999) (same); *cf. Flying Boat, Inc. v. Alberto*, 723 So. 2d 866, 868 (Fla. 4th DCA 1998) (state law remedies for maritime death have been allowed only where more generous than federal law.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL D. ERIKSEN
ROMANO, ERIKSEN & CRONIN
Post Office Box 21349
West Palm Beach, FL 33416-1349
(561) 533-6700

---

5. *See Brief of Petitioner* at 9-10,12.